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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

[Protest Alleging Awardee's Bid Was Nonresponsive and Awardee Nonresponsive]

FILE: B-200646

DATE: January 30, 1981

MATTER OF: Lite Industries, Inc.

DIGEST:

1. Although "buying-in" is discouraged, Government may accept below-cost bid if bid is otherwise acceptable. Alleged below-cost bid which takes no exception to requirements of solicitation is responsive.
2. Whether awardee provides compliant fire-fighting suits is matter of contract administration, which is responsibility of procuring activity, not GAO.
3. Contracting officer's determination that bidder has capability to supply compliant firefighting suits involves affirmative determination of responsibility which is not reviewable by GAO except in circumstances not relevant here. Bidder's alleged lack of planning for required supplies does not involve compliance with definitive responsibility standard.
4. Allegation that awardee's bid was based on expectancy of future changes to specification must be rejected as speculative since bid did not take exception to specifications and awardee is bound to deliver specified items at bid price.

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On August 26, 1980, the Defense Logistics Agency (DLA) issued invitation for bids (IFB) DLA100-80-B-1233 for the procurement of fire-fighting proximity suits (i.e., coat, trousers, gloves, and hood) containing "aluminized asbestos-aramid" fabric. Thirty firms were solicited; three bids were received. Cecile Industries, Inc. (Cecile), submitted the low bid for all items.

After bid opening, Lite Industries, Inc. (Lite), filed a protest contending that Cecile's bid was nonresponsive and that Cecile should be considered to be a nonresponsible bidder. Nevertheless, DLA awarded the contract to Cecile on December 3, 1980, because of an "urgent need for the aluminized Fireman's Ensemble," after finding the company to be a responsive and responsible bidder.

Lite's specific grounds of protests are as follows:

1. Cecile is buying-in by submitting a below-cost bid. Cecile cannot supply compliant suits at its bid price, which evidences that it does not intend to use the specified fabric. Therefore, Cecile's bid should have been rejected as nonresponsive.
2. Cecile did not have firm orders from the sole-source suppliers of the required fabric and aluminization. This lack of planning constitutes a failure to comply with a definitive responsibility standard.
3. Cecile's low bid was "based upon a reliance and expectancy of projected specification changes" concerning "Heat Reflectivity" and the type of fabric to be supplied. These "projected specification changes were not known to all bidders." If the projected changes are to be put into effect there should be a "new bid" for the suits which will enable DLA to "reap the benefits of full competition."

"Buying-In"

Although "buying-in" is discouraged, the practice is not illegal, and the Government may accept a below-cost bid. See Defense Acquisition Regulation §1.311 (1976 ed.) and Allied Technology, Inc., B-185866, July 12, 1976, 76-2 CPD 34. Thus, a low bidder may incur a loss at its bid price, but this projected loss does not justify rejecting an otherwise acceptable bid. Inter-Con Security Systems, Inc., B-189165, June 15, 1977, 77-1 CPD 434.

We agree with DLA that Cecile submitted an otherwise acceptable bid since the company did not take exception to any of the terms or conditions of the IFB. Further, whether the firefighting suits to be delivered by Cecile under the contract actually comply with the specifications is a matter of contract administration which is the responsibility of the procuring activity, not GAO.

Supplier Commitments

Based on a favorable preaward survey which "identified [Cecile's] sources for the specification material and attested to the company's ability to perform as required," the contracting officer found Cecile to be responsible. Nevertheless, Lite challenges the contracting officer's affirmative determination of responsibility. This matter need not be considered since we do not review affirmative determinations of responsibility, except in circumstances not relevant here. Masoneilan Regulator Company, B-188980, February 24, 1978, 78-1 CPD 154.

Specifically, we reject Lite's assertion that adequate planning for the fabric in question should be considered to be a "definitive" responsibility standard. On the contrary, in determining whether a bidder has adequately planned for required supplies and services, the contracting officer must exercise the kind of business judgment which we no longer review. See Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Consequently, we dismiss this ground of protest.

Specification Changes

Cecile's bid did not take an exception to the specifications in question and the company is therefore contractually bound to deliver the specified items at its bid price. Thus, Lite's allegation that Cecile's bid was not based on the present specifications but rather on the expectancy of future changes must be rejected as speculative.

Accordingly, the protest is denied in part and dismissed in part.

A handwritten signature in cursive script, reading "Milton F. Fowler".

For the Comptroller General
of the United States